Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

GERARD V. SUNNEN,

Petitioner,

– against –

THE NEW YORK STATE DEPARTMENT OF HEALTH, BOARD OF PROFESSIONAL MEDICAL CONDUCT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the choice of the administrative law judge, at the Petitioner's disciplinary hearing, not to recuse herself, nor to disclose, on the record her residence of several years, in the same apartment building where one of the two complaining witnesses resided and afford the Petitioner a motion for recusal, based on the foregoing, deprive the Petitioner of a fair and impartial hearing?

2. Is an administrative law judge, who does not decide the issue on trial, and whose function is limited to procedural and evidentiary rulings, governed by the same criteria as a trier of the facts, if the statute concerning judicial review of the administrative hearing's decision, considers only whether the evidence in the record at the hearing, supports the decision?

PARTIES TO PROCEEDING

The parties to this proceeding are, as they appear on the cover.

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Barszez v. Board of Trustees of Community College Dis No. 504, Cook County 400 F. Supp. 675, Affd 539 F 2d 715 Cert. dismd 420 US 1080, 97 S. Ct. 827, 50 LEd 2d 801 (1975) 7

Feldman v. Gardner, 460 US 462, 103 S.Ct. 1303, 75 L.Ed 2d 206 (1983) 1

Rooker v. Fidelity Trust Co., 263 US 413, 44 S.Ct. 149, 68 L.Ed 362 (1923) 1

Other Authority

3 Davis, Administrative Law §19.2-19.4 [2d ed, 1978] 7

Citations of the Official and Unofficial Reports of the Opinions and Orders

The Order of the Supreme Court for the County of New York, dated December 15, 2003, is reproduced in the Appendix at page A-5.

The Order of the Appellate Division — First Department, dated February 17, 2005, is reproduced in the Appendix at page A-3.

The Order of the Court of Appeals, dated June 7, 2005, denying petitioner's motion for leave to appeal is reproduced in the Appendix at page A-1.

Basis of Jurisdiction

Review of final decision, order and judgment of highest court in New York, entered June 7, 2005 denying leave to appeal. There was no rehearing. The New York Court of Appeals denied leave to appeal the decision, order and judgment of the New York State Supreme Court, Appellate Division, First Department, entered February 17, 2005.

The United States Supreme Court has jurisdiction pursuant to *Feldman v. Gardner*, 460 US 462, 103 S.Ct. 1303, 75 L.Ed 2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 US 413, 44 S.Ct. 149, 68 L.Ed 362 (1923).

Constitutional and Statutory Provisions Involved

United States Constitution, 14th Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

Factual and Procedural Background

The Petitioner was the subject of a disciplinary hearing by the Respondent. The charges were based on the complaints of two persons who identified themselves as psychiatric patients of the Petitioner. The Respondent decided against

the Petitioner and revoked his license to practice medicine. The Petitioner exhausted his right to judicial review and was denied any remedy.

Approximately five years thereafter, the Petitioner fortuitously learned that one of the two complaining witnesses lived in the same apartment building as did the administrative law judge at the disciplinary hearing, prior to, during the events this witnesses testified to, some of which she alleged occurred in her apartment, and continuing throughout the lengthy hearing. The administrative law judge had not disclosed the foregoing facts. In so far as the Petitioner knew and the record disclosed, the administrative law judge and the complaining witness were strangers.

The administrative law judge did not recuse herself, nor place the issue of her residence on the record, nor afford the Petitioner a recusal motion on the foregoing grounds.

The Petitioner sued in the New York Supreme Court, pursuant to 42 USC §1983. The gravamen of the complaint was independent of the issue considered at the hearing. The Complaint was, that the foregoing misconduct of the administrative law judge denied due process to the Petitioner. The motion term of the New York Supreme Court dismissed the Complaint on the grounds that, pursuant to the applicable statute, Civil Practice Law and Rules, Article 78, the exclusive remedy of the Petitioner was a proceeding pursuant to that statute, the exclusive forum was the New York State Appellate Division, Third Department and the time within which to commence such a review had expired years ago.

The Petitioner appealed dismissal of his complaint, to the New York State Appellate Division, First Department, arguing that the Complaint was not concerned with the charges against him, which were considered at the Respondent's administrative hearing. The Petitioner's Complaint concerned the denial of due process to him, at that administrative